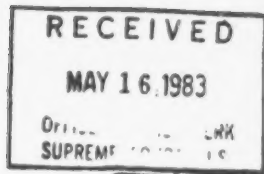


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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

T. J. HAYES

PETITIONER

VS.

STATE OF ARKANSAS

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

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ON PETITION FOR WRIT OF CERTIORARI
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Petitioner, T. J. Hayes, a prisoner under sentence of death, petitions for a writ of certiorari to review the affirmance of his conviction of capital murder and sentence of death.

QUESTION PRESENTED

Whether a capital defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments are violated by the absence, in the Arkansas death penalty statutes and case law developed by the Arkansas Supreme Court, of standards for comparative review of sentences. and to inquire as to an erroneous jury finding.

OPINION BELOW

The opinion of the Supreme Court of Arkansas, reproduced in the appendix hereto, is reported as Hayes v. State, 278 Ark. 211, 645 S.W. 2d 662 (1983). This appeal was from Petitioner's second conviction. His first conviction was reversed and remanded for failure by the State to comply with discovery orders for his psychiatric records. Hayes v. State, 274 Ark. 440, 625 S.W. 2d 498 (1981).

JURISDICTION

The decision of the Arkansas Supreme Court denying a timely petition for rehearing and issuing the mandate was handed down February 28, 1983. Mr. Justice Blackmun extended the time for filing a petition for writ of certiorari to May 16, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3) with Petitioner asserting deprivation of rights secured by the U.S. Constitution

STATEMENT OF THE CASE

On or about July 16, 1979 two persons were killed in Jefferson County, Arkansas. Shortly thereafter, Petitioner T. J. Hayes was charged with capital murder by a felony information filed in the Circuit Court of Jefferson County. Petitioner, who is black, was declared indigent, and counsel was appointed to represent him. Petitioner was tried in October, 1980 and was convicted and sentenced to death by electrocution. This conviction and sentence was reversed by the Supreme Court of Arkansas for failure by the State to comply with court orders regarding release of Petitioner's psychiatric records. Hayes v. State, 274 Ark. 440, 625 S.W. 2d 498 (1981).

Petitioner was again tried in May, 1982, and again convicted and sentenced to death. This conviction and sentence was affirmed by the Supreme Court of Arkansas. Hayes v. State, 278 Ark. 211, 645 S.W. 2d 662 (1983). A timely petition for rehearing was denied, and the mandate issued on February 28, 1983. The Court subsequently granted his appointed counsel's motion to be relieved, and stayed the execution date (which had been scheduled for April 1) to permit him to petition the United States Supreme Court for a writ of certiorari.

From the affirmance of his conviction by the Supreme Court of Arkansas, Petitioner brings this

petition for writ of certiorari. The time for
filing a petition for writ of certiorari was ex-
tended by Mr. Justice Blackmun to May 16, 1983

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

No person shall be...deprived of life, liberty, or property without due process of law;...

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...and to have the assistance of counsel for his defense.

Eighth Amendment, United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution:

...(N)or shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Ark. Stat. Ann. 41-1501(1)

A person commits capital murder if:

- (a)....
- (b)....
- (c)....with the premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode.

Ark. Stat. Ann. 41-1301:

The following procedures shall govern trials of persons charged with capital murder:

- (1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.
- (2) If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense, sentence shall be determined and imposed as pro-

vided by law.

(3). If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by section 1302 (41-1302); except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4). In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in section 1303 (41-1303), or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to aggravating circumstances set forth in section 1303(41-1303) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

Ark. Stat. Ann. 41-1302:

(1) The jury shall impose a sentence of death if it unanimously returns written findings that:

(a) aggravating circumstances exist beyond a reasonable doubt; and

(b) aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(c) aggravating circumstances justify a sentence of death beyond a reasonable doubt

(2) The jury shall impose a sentence of life imprisonment without parole if it finds that:

(a) aggravating circumstances do not exist beyond a reasonable doubt; or

(b) aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(c) aggravating circumstances do not justify a sentence of death beyond a reasonable doubt

(3) If the jury does not make all findings required by subsection (1), the court shall impose a sentence of life imprisonment without parole.

Ark. Stat. Ann. 41-1303:

Aggravating circumstances shall be limited to the following:

(1) the capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) the capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) the person previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person;

(4) the person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;

(5) the capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) the capital murder was committed for pecuniary gain; or

(7) the capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

Ark. Stat. Ann. 41-1304

Mitigating circumstances shall include, but are not limited to the following:

(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as the result of mental disease or defect, intoxication, or drug abuse;

(4) the youth of the defendant at the time of the commission of the capital murder;

(5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor.

(6) the defendant has no significant history of prior criminal activity

REASONS FOR GRANTING THE WRIT

THE ABSENCE OF STANDARDS FOR COMPARATIVE REVIEW OF DEATH SENTENCES IN ARKANSAS, AND THE REFUSAL OF THE ARKANSAS COURTS TO VACATE IN THE LIGHT OF AN ERRONEOUS JURY FINDING VIOLATES PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This case affords the Court an opportunity to delineate standards for comparative review in capital cases, and to outline the obligations of lower courts where there is an erroneous jury finding.

There are seven formulations of capital murder in Arkansas. Ark. Stat. Ann. 41-1501. Petitioner was charged and convicted under Ark. Stat. Ann. 41-1501(1)(c), the premeditated and deliberated killing of two persons in the same criminal episode. Petitioner presented a defense of diminished capacity due to alcoholism and various psychiatric problems.

Arkansas provides seven possible aggravating circumstances; six mitigating circumstances are listed, but the jury is not thereby limited. The jury determines the existence or non-existence of the circumstances, then performs a weighing test to determine whether to impose a sentence of death or of life imprisonment without parole.

Pursuant to instructions promulgated by the Supreme Court, interrogatories are submitted to the jury, as was done in Petitioner's trial. The section on mitigating circumstances has four parts: unanimous

findings of existence, non-unanimous findings of existence, findings that evidence was presented but that the evidence did not support a finding of existence, this being a unanimous verdict, and, finally, a finding that there was no evidence.

In Petitioner's case, the jury found one aggravating circumstance: that he had previously committed a felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person. The jury found no evidence of any mitigating circumstance, this despite the fact that among the mitigating circumstances available was that "the capacity...to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse," and that evidence was presented as to his alcohol and psychiatric problems. The jury finding that no evidence was presented was thus clearly erroneous. If evidence was presented and the jury was not convinced or swayed by it, the proper answer would have been that the evidence was presented but that the jury unanimously found that it did not exist at the time.

The Arkansas Supreme Court stated merely that in its comparative review of sentences, it found the sentence not excessive. The Court did not address the issue of an erroneous finding on the penalty phase interrogatory.

The United States Supreme Court has noted for some time the requirement of detailed appellate review of capital cases, and has looked with approval upon those states that present standards for review for integrity and consistency of verdicts and to guard against those arbitrarily, capriciously or freakishly applied. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976). Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976).

The Arkansas Supreme Court has stated in several opinions that it exercises comparative review. Sumlin v. State, 273 Ark. 185, 617 S.W. 2d 372 (1981). Sumlin's sentence was reduced to conform to that assessed against Mrs. Sumlin in the same incident. Subsequent to the rendering of the opinion in Peterson's case, the Arkansas court reduced a death sentence to life without parole because the defendant was only an accomplice and the jury may have sentenced him out of passion and prejudice. Henry v. State, 278 Ark. 478 (Feb. 28, 1983). A concurring opinion by Justice Hickman noted that Henry was the "first capital case in which we have actually had to compare the propriety of the death sentence with the sentence

in other cases." Justice Hickman referred to the court having "made a pact, so to speak, that we would, on our own, make certain that the death penalty was not the result of passion, prejudice or excessive under the circumstances." 278 Ark. at 496.

The Arkansas court thus indicated that it employs comparative review. However, except for saying why Sumlin's and Henry's sentences were reduced, enunciated standards to govern the process of review. The Ninth Circuit has noted that for comparative review to be meaningful, there must be ascertainable and reviewable standards. Harris v. Pulley, 692 F.2d 1189 (1982).


In reading Petitioner's case in the light of Arkansas' decision in Henry, it is clear that no standards were used in comparing Hayes' sentence with others. For instance, no mention was made of any reasoning process behind the review, but rather merely a conclusion. Particularly, in the light of the fact that the absolute minimum number of aggravating circumstances were found (one) under which the death penalty could be assessed and that the jury found that no evidence was presented for a certain proposition (in contradiction with the facts of the testimony, the weight of it being another matter), the review done by the Arkansas court is meaningless. Moreover, the failure of the Arkansas Supreme Court to vacate the sentence in light of this incorrect finding with regard to lack of miti-

gation is in itself violative of Petitioner's rights of due process, fair trial, and guarantee against cruel and unusual punishment.

CONCLUSION

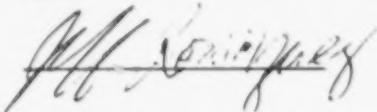
The petition for writ of certiorari to the Supreme Court of Arkansas should be granted and the holding of that court reversed. This Court should set this matter for oral argument on the issues outlined above.

Respectfully submitted,


JEFFREY M. ROSENZWEIG
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(501) 372-5247
Attorney for Petitioner pro
hac vice and pro bono pub-
lico

CERTIFICATE OF SERVICE

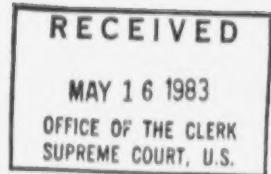
I, Jeffrey M. Rosenzweig, attorney for Petitioner, do hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari to Hon. Matthew Fleming, Assistant Attorney General, Justice Building, Little Rock, Ark. 72201 by depositing the same in the U.S. mail, first class postage prepaid this 13 day of May, 1983.



JEFF ROSENZWEIG
ATTORNEY AT LAW
310
THREE HUNDRED SPRING BUILDING
LITTLE ROCK, ARKANSAS 72201

PHONE 372-5247

May 13, 1983



Hon. Alexander Stevas
Clerk
Supreme Court of the United States
Washington, D.C.

82 6741

RE: T.J. HAYES VS. ARKANSAS


Dear Sir:

Enclosed with this letter is a Petition for Writ of Certiorari, the time for filing of which was extended by Mr. Justice Blackmun to May 16. This letter and petition is sent via Express Mail.

Mr. Hayes has been declared indigent by the Circuit Court of Jefferson County Arkansas and the Supreme Court of Arkansas, and I am handling this matter on a pro bono publico basis. Due to the vagaries of getting mail from Mr. Hayes place of incarceration, the Death Row section of the Cummins Unit of the Arkansas Department of Correction, and, I suspect, Mr. Hayes' mental condition, I do not have a current signed affidavit from Mr. Hayes. However, I will be seeing him in person in the near future and will be able to get his signature on an affidavit to proceed in forma pauperis.

Thank you very much for your consideration in this matter.

Sincerely yours,


Jeff Rosenzweig

JR:jm
Encl.
cc: Matthew Fleming

T. J. HAYES v. STATE of Arkansas

CR 82-113

Supreme Court of Arkansas

Opinion delivered January 24, 1985

1. **CRIMINAL LAW — DEATH QUALIFIED JURY NOT BIASED IN FAVOR OF PROSECUTION.** — The Supreme Court has consistently rejected the argument that the defendant was denied an impartial jury because the jury was "death qualified" and therefore was biased in favor of the prosecution.
2. **CRIMINAL LAW — DEATH PENALTY NOT UNCONSTITUTIONAL.** — The Supreme Court has consistently rejected the argument that the Arkansas death penalty is unconstitutional.
3. **CRIMINAL PROCEDURE — NO VIOLATION OF EQUAL PROTECTION CLAUSE TO DISTINGUISH BETWEEN PERSONS SERVING PRISON TERM WHILE AWAITING TRIAL AND THOSE INCARCERATED ONLY ON PRINCIPAL CHARGE.** — A.R. Cr. P. Rules 28.1 — 30.2 make a valid distinction for purpose of the equal protection clause of the 14th amendment between persons serving a term of imprisonment on another conviction while awaiting trial on the principal charge and persons incarcerated solely as a result of the principal charge.
4. **APPEAL & ERROR — SAME ARGUMENT WILL NOT BE CONSIDERED AGAIN ON SECOND APPEAL.** — Where appellant's other arguments regarding his right to a speedy trial were resolved on his first appeal, they will not be considered again.
5. **EVIDENCE — INFLAMMATORY PHOTOGRAPHS ADMISSIBLE IF SHED LIGHT ON ANY ISSUE.** — Even inflammatory photographs are admissible in the sound discretion of the trial court if they tend to shed light on any issue or are useful to enable a witness to better describe the objects portrayed or the jury to better understand the testimony.
6. **EVIDENCE — PHOTOGRAPHS NOT INADMISSIBLE MERELY BECAUSE THEY ARE CUMULATIVE.** — A photograph is not rendered inadmissible merely because it is cumulative.
7. **EVIDENCE — DECISION ON ADMISSIBILITY OF PHOTOGRAPHS NOT REVERSED UNLESS CLEAR ABUSE OF DISCRETION.** — The Supreme Court will not reverse the decision of the trial court to admit photographic evidence unless there is a clear abuse of discretion.
8. **TRIAL — WIDE DISCRETION IN GRANTING OR DENYING OF MISTRIAL — NOT REVERSED ABSENT ABUSE OF DISCRETION OR MANIFEST PREJUDICE.** — The trial court is granted a wide discretion in

- granting or denying a mistrial, and its decision will not be reversed except for abuse of discretion or manifest prejudice.
9. TRIAL — DISCRETION NOT ABUSED IN DENIAL OF MISTRIAL. — It cannot be said that the trial court abused its discretion in denying the motion for mistrial where the undesired response was elicited by appellant's attorney.

Appeal from Jefferson Circuit Court, First Division;
Randall L. Williams, Judge; affirmed.

Leon N. Jamison of Jamison & Glover, for appellant.

Steve Clark, Atty. Gen., by: Matthew Wood Fleming, Asst. Atty. Gen., for appellee.

RICHARD B. ADKISSON, Justice. This is the second time that appellant, T. J. Hayes, has been convicted by a jury of the capital felony murder of his girlfriend, Catherine Carter, and a cab driver, J. W. Lunsford, and sentenced to death. On the first appeal we reversed and remanded, *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981). We now affirm.

At trial, the girlfriend's parents testified that on the afternoon of July 16, 1979, appellant and their daughter, who were both black, were at their home in Pine Bluff. By previous agreement with the Yellow Cab Company, a cab was to pick the daughter up for work at about 2:30 p.m. each afternoon. On that particular day when the cab with a white male driver arrived, their daughter and appellant got into the cab. At approximately 2:30 p.m. that same afternoon a security officer on duty in front of the Arkansas Department of Correction Administration Building saw appellant and a black female in Yellow Cab No. 11, driven by a white male, pass by going about 20 miles per hour on Princeton Pike.

According to a statement appellant gave to the police, he told the cab driver to drive out on Princeton Pike where they stopped at an unoccupied house. All three got out, and appellant, who was armed with a .38 caliber pistol, told the cab driver to go back to town. The cab driver made a move as though he was attempting to disarm appellant, and appellant shot him twice. Appellant and the girlfriend then

entered the house, where the girlfriend told him to forget her, that she did not want to see him anymore because she was interested in someone else. Appellant shot her twice. Appellant then drove the cab to Townsend Park and hid it in a wooded area.

At about 3:30 p.m. the security officer saw appellant driving the cab in which he had seen the three of them earlier. Later that day between 4:15 p.m. and 4:30 p.m. appellant walked into the Jefferson County Sheriff's Office and announced that he wanted to turn himself in saying, "I think I just killed my girlfriend." He then led officers of the Pine Bluff Police Department to the scene of the crime and to the place where he had hidden the cab. About 7:30 p.m. that evening, after being fully advised of his rights, he gave a statement to officers from the sheriff's office and signed a waiver form. We find sufficient evidence to support the jury's finding that appellant was guilty as charged.

Appellant argues that he was denied an impartial jury because the jury selected was "death qualified" and therefore was biased in favor of the prosecution; and that the Arkansas death penalty is unconstitutional. This court has consistently rejected each of these arguments. *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981); *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981); *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, ___ U.S. ___, 101 S.Ct. 1750 (1981); *Williams v. State*, 276 Ark. 399, 635 S.W.2d 265 (1982). *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977); *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979).

Appellant argues that he has not been accorded equal protection of the law in violation of the United States Constitution Amendment 14 because the speedy trial provisions of A.R.Cr.P. Rules 28.1—30.2, Ark. Stat. Ann., Vol. 4A (Repl. 1977) distinguish between persons serving a term of imprisonment on another conviction while awaiting trial on the principal charge (must be brought to trial within eighteen months), and persons incarcerated as a result of the principal charge to be tried (must be brought to trial within eighteen months, but entitled to release from incarceration after nine months). We reject this argument because neither

is entitled to absolute discharge until eighteen months under Rule 30. Furthermore, appellant has failed to show any prejudice resulting from his incarceration prior to trial.

Appellant's other arguments regarding his right to a speedy trial were resolved on his first appeal, *Hayes v. State* *supra* and will not be considered again.

Appellant argues that the trial court erred in admitting certain photographs and slides which were alleged to be redundant and introduced solely to inflame the jury. Even inflammatory photographs are admissible in the sound discretion of the trial court if they tend to shed light on an issue or are useful to enable a witness to better describe the objects portrayed or the jury to better understand the testimony. *Sumlin v. State*, 266 Ark. 709, 587 S.W.2d 511 (1979). Here, the trial court could have concluded that the photographs and slides would help the jury to understand the crime scene, the sequence of events, and the nature of the wounds inflicted. Also, a photograph is not rendered inadmissible merely because it is cumulative. *Prunty v. State*, 271 Ark. 77, 607 S.W.2d 374 (1980). We will not reverse the decision of the trial court unless there is a clear abuse of discretion; no such abuse has been shown here.

Appellant argues that the trial court erred in granting a mistrial when, during direct examination, a defense witness referred to the fact that appellant had been paroled.

[Mr. Jamison, Attorney for Appellant]

Q You did counsel Mr. Hayes personally on a few occasions.

[Witness Bessie Lancelin]

A Yes.

Q Just what does that entail — the counseling sessions?

A Well, it would depend. In his particular situation, he had been referred to us by his probation officer at the

time because he had been recently paroled. So it would vary with different people. And we had to set up a plan that was individualized that would meet his particular needs. You want to know what I said to him at the time that he came in?

After the witness had been cross-examined, the following exchange took place in chambers:

Mr. Jamison: Your Honor, I do have one more motion to make. During the testimony of Bessie Lancelin, and without my — I guess I did solicit the answer. Ms. Lancelin did refer to the fact that Mr. Hayes was on parole, and I did not do this in order to try to create some technicality for a new trial, but I do feel that that answer was — or the referral to Mr. Hayes' being on parole was prejudicial, and for that reason I would move for a mistrial.

The Court: Of course, the Court heard the testimony and I'm willing to instruct the jury to totally disregard it and not consider it for any purpose whatsoever or any other reasonable request that you could make. Since the answer was elicited — Not directly, but it was a result of direct examination by a defense witness, to some extent, at least, it was invited. The witness probably should have been cautioned by counsel before testifying not to mention that fact. It of course came as a surprise to me. But at this time I'd be glad to instruct the jury or take whatever action necessary short of a mistrial. I would deny the motion for a mistrial.

Mr. Jamison: Your Honor, I do feel that regarding any more reference to that statement by her, I don't think it should be brought to the jury's attention. I do think that it would just invite more attention to that particular statement.

The Court: Okay.

The trial court also instructed the prosecutor to refrain from making any references to the fact that appellant was on parole.

The trial court is granted a wide latitude of discretion in granting or denying a mistrial, and its decision will not be reversed except for abuse of discretion or manifest prejudice. *Cobb v. State*, 265 Ark. 527, 579 S.W.2d 612 (1979). Here, we cannot say the trial court abused its discretion in denying the motion for mistrial where the undesired response was elicited by appellant's attorney.

We find no evidence that the jury's verdict was based on either passion or prejudice, nor do we find the imposition of the death penalty in this case to be arbitrary, capricious, or wanton. In our comparative review of death sentences, we find the sentence not excessive.

In the sentencing phase of the trial the jury received as evidence of aggravating circumstances three prior felony convictions, one for second degree murder and two for shooting with intent to kill or wound. This evidence supported the jury's finding that appellant had previously committed another felony, an element of which was the use or threat of violence to another person. At appellant's insistence his sister was not allowed to testify regarding mitigating circumstances; the jury found none existed. The jury's finding that the aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances is supported by the evidence.

We have examined all objections pursuant to Rule 11 (f), Rules of the Supreme Court, Ark. Stat. Ann., Vol. 3A (Repl. 1977) and find no error. See *Earl v. State*, 272 Ark. 5, 611 S.W. 2d 98 (1981).

Affirmed.
